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NO. 82-2015

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GEORGE G. DAVIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY IN OPPOSITION TO THE MOTION TO EXPEDITE CONSIDERATION OF THE PETITIONS

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MATTHEW L. BYRNE, ESQ., Hollman & Byrne, on behalf of the Petitioners GEORGE G. DAVIS and I.D.T. CORPORATION, oppose the Motion of the Solicitor General to expedite consideration of the petition for a Writ of Certiorari in this case. The petition in No. 82-2015 was filed on June 10, 1983.

Our Reply Memorandum to the Memorandum of the United States in Opposition to our Petition for a Writ of Certiorari, received by our office on June 17, 1983, is being filed in typescript (to be followed by printed copies) with this reply on June 21, 1983, setting forth our response to the Government's Memorandum.

Our opposition to the instant Motion of the Government for an expedited consideration of our Petition for Certiorari is based on the following factors:

1. The Government states that the term of the Grand Jury investigating this matter expires on September 8, 1983. It is respectfully submitted that this fact should not serve on a basis for expediting consideration of our Petition for Certiorari, since it is within the power of the Government to convene a second Grand Jury if our Petition is not

decided by the expiration date of the current Grand Jury. While this might necessitate reconsideration of the evidence already collected, such fact should not serve as a reason for denying Petitioners the normal amount of time the court might otherwise devote to a full consideration of all of the issues raised in our Petition.

2. The Frigitemp Bankruptcy was filed on March 3, 1978 and shortly thereafter the investigation by the United States Attorney for the Southern District of New York as well as the Securities and Exchange Commission was initiated. Now, more than five years after the commencement of the investigation, the Government seeks a "rush to judgment" on the grounds that the term of a Grand Jury, which can readily be replaced by another Grand Jury, is about to expire. The Government seeks to remedy their delay by having the Court deny Petitioner the amount of time that would, in the normal course of events, be devoted by the Court to consideration of the Petition. Any delay, as evidenced by the length of time this matter has been under investigation, and any problems attendant thereto, are solely the responsibility of the Government and they, not the Petitioner, should bear the responsibility and any attendant inconvenience to the Government that results therefrom.

3. The issue presented in this case as to what type of misconduct or fraud on the part of the Government can give rise to estoppel being applied to the Government is a complex one and, it is respectfully submitted, deserves the reasoned consideration of the Court in the light of the voluminous facts of the case and should not be subject to an artificial time schedule set by the Government simply because it may prove inconvenient for the Government if a decision on the Petition is not made before the expiration date of the Grand Jury.

4. On or about the time of submission of the instant Petition for Certiorari, certain facts relative to the Government's actions in this case became known which further demonstrate the misconduct of the Government in this case.

5. On October 2, 1981, the U.S. Department of Justice wrote to the Central Authority of Switzerland requesting their assistance under a certain Treaty of Mutual Assistance in Criminal Matters. The request stated copies of certain records of Swiss Bank Accounts were needed by the Department of Justice in connection with a Criminal Investigation. The Treaty under which the records were requested provides that records requested thereunder can only be used in connection with certain types of Criminal Investigations and for no other purpose.

6. The Government then requested the Swiss Authorities to block certain Swiss Accounts on the grounds that they represented funds illegally obtained. The Government was required under Swiss Law to produce evidence of the allegations of illegal activity by a certain date or the funds would not remain blocked. After several extensions of time in which to submit their evidence had been granted, the Government failed to produce the evidence they allege they had, so the blocking under the Treaty of Mutual Assistance was lifted. However, the Government then instituted a Civil Suit in Switzerland claiming to be a Creditor and again had the funds attached under a Swiss Civil Procedure. The Government then requested and was granted several extensions of time to submit evidence to support their Civil Suit and again failed to meet the deadline dates established by the Swiss Courts. Finally, the Swiss Government directed Counsel for the Civil Defendant to file an answer to the complaint. The Answer was filed and demanded the suit be dismissed on the grounds that the Government had never submitted any evidence in support of their claim despite the fact that over a year had passed

since the Government originally filed suit. The Government then advised the Swiss Authorities on May 27, 1983 that the Trustee in Bankruptcy for the Frigitemp Estate had commenced a Civil Action in the United States against a number of individuals and companies that he alleged engaged in fraudulent conduct resulting in fraud on Frigitemp. The Government requested a stay of all Civil Proceedings in Switzerland until completion of the Trustees' Civil Case on the grounds that the evidence adduced in that case was needed by the Government to prove its case in Switzerland. The Swiss Courts have not as yet ruled on the most recent application of the Government for a further stay.

7. On or about June 8, 1983, we were advised that the U.S. Government had turned over to the Frigitemp Trustee in Bankruptcy certain of the banking records obtained pursuant to the Treaty of Mutual Assistance in order to permit the Trustee to file a Civil Suit in the United States. The turnover of these documents constitutes a breach of the Treaty of Mutual Assistance and is in violation of the request for assistance filed by the Government with the Swiss Authorities on October 2, 1981. Furthermore, the Government, when it requested a stay of the Civil proceedings in Switzerland, never advised the Swiss Government that the Trustee's lawsuit was based on Swiss Banking Records obtained by the Government under the Treaty of Mutual Assistance and then turned over to the Trustee in violation of that Treaty. A formal protest is being prepared to be lodged with the Swiss Government in connection with this matter.

8. We bring this matter to the attention of the Court as illustrative of the type of misconduct the Government is engaging in relative to this matter. Petitioner is attempting to develop the facts, which the Government has

concealed, for consideration by this Court in connection with this Petition.

Respectfully submitted.

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